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No. 87-671

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF CONNECTICUT, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Congress provided in 1984 that local authorities may "regulate rates for the provision of basic cable [television] service [only] in circumstances in which a cable system is not subject to effective competition" and directed the Federal Communications Commission to "define the circumstances in which a cable system is not subject to effective competition." 47 U.S.C. (Supp. III) 543(b)(1) and (2)(A). The question presented is whether the Commission permissibly concluded that "effective competition" exists when three broadcast television signals can be received "off the air" in a community.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A115-A185) is reported at 823 F.2d 1554. The orders of the Federal Communications Commission (Pet. App. A1-A95, A96-A114) are reported at 50 Fed. Reg. 18637 and 51 Fed. Reg. 21770.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1987. The petition for a writ of certiorari was filed on October 15, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Most cable television operators provide "basic" and "premium" services. Basic service, which all subscribers receive, usually includes retransmission of local broadcast

signals and satellite programming such as the Cable News Network. Premium service, for which subscribers pay additional fees if they desire it, typically includes channels such as Home Box Office. See Pet. App. A131 n.3. Prior to 1984, the Federal Communications Commission had concluded that local authorities could regulate the rates charged for basic cable service, but could not regulate the rates charged for premium services. *Id.* at A131.

In 1984, Congress enacted the Cable Communications Policy Act, Pub. L. No. 98-549, 98 Stat. 2779, 47 U.S.C. (Supp. III) 521 *et seq.* Section 623(a) of the Act provides that local authorities "may * * * regulate the rates for the provision of cable service * * * only to the extent provided under this section." 47 U.S.C. (Supp. III) 543(a). Section 623 does not authorize the regulation of rates for premium service; Congress's decision not to permit regulation of premium service rates "appears to have been made based, at least in part, on a belief that alternative video delivery systems [such as video cassette recorders and direct satellite reception] provided sufficient existing or potential competition to nonbasic services that rate controls would be counterproductive." Pet. App. A44-A45. Section 623(b)(1) provides that local authorities may "regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition." 47 U.S.C. (Supp. III) 543(b)(1). Thus, under the Act only basic service is subject to rate regulation, and it is subject to such regulation only in the absence of "effective competition."

Congress directed the Commission to promulgate regulations that "define the circumstances in which a cable system is not subject to effective competition." 47 U.S.C. (Supp. III) 543(b)(2)(A). It provided that the Commission was to adopt such regulations within 180 days (47 U.S.C. (Supp. III) 543(b)(1)) and further provided that "[t]he

Commission shall periodically review such regulations" and amend them "to the extent the Commission determines necessary" (47 U.S.C. (Supp. III) 543(b)(3)). In addition, Congress directed the Commission to submit "a report regarding rate regulation of cable services" by 1990. 47 U.S.C. (Supp. III) 543(h).

2. The Commission promptly instituted the rulemaking proceeding that is the subject of petitioners' complaints. After receiving comments from more than 140 parties (Pet. App. A134), the Commission concluded that "a cable system will be considered to face effective competition whenever the franchise market receives three or more unduplicated broadcast signals" (*id.* at A47 (footnote omitted)).

Before reaching that conclusion, the Commission first considered whether it should adopt standards for determining when an entire "cable system" (including both basic and premium service) is subject to effective competition or whether it should limit its inquiry to establishing standards for determining whether basic cable service is subject to effective competition. The Commission concluded that since "rate regulation authority is limited to regulation of basic cable service," it should limit its analysis to the "question of effective competition to basic cable service." Pet. App. A43. The Commission disagreed with the concern of some commenters that "cable systems may have market power in the provision of nonbasic service and that this power could be extended to their provision of basic service," concluding that its review of the antitrust literature convinced it that there is no merit to such a "tying arrangement" argument. *Id.* at A44 n.63.

The Commission further determined that "a standard for defining effective competition based on the availability of off-the-air broadcast signals in the cable system's community is appropriate." Pet. App. A43. It thus concluded

that the question whether effective competition exists should be answered by determining the number of television stations that can be received in a community without the use of cable and rejected suggestions that it should consider other factors, such as the "penetration rate" of cable service. Noting that a number of commenters had proposed that a cable operator should be subject to rate regulation if 70% of households in the community have subscribed, on the theory that such a high penetration rate shows a lack of effective competition (*id.* at A49), the Commission stated that "a penetration criterion would penalize cable operators who have attained substantial subscriber penetration by providing low-priced popular cable offerings and services" (*id.* at A51).

The Commission next concluded that "three broadcast signals are the minimum number of signals needed" to ensure that there is effective competition to basic cable service. Pet. App. A45. The Commission determined that the presence of three broadcast stations would be "sufficient to allow viewers adequate and significant programming choices" and to ensure that basic cable service "does not become a source of market power for the cable operator." *Ibid.* In rejecting the suggestion that the existence of two broadcast stations would be sufficient, the Commission noted that its review of viewing data showed that "in two signal markets the viewership share of [cable] programming could be as large or larger than the off-air viewership of the typical local station in such a market" (*ibid.*)—thus indicating a potential for market power in such communities. The Commission also rejected suggestions that more than three broadcast signals should be required. It noted that "[i]n three signal markets, the cable viewership of such basic programming was in general less than the off-air viewership of a single local signal" and less than one-third of the market, and concluded that a "viewership

share of 33% or less is a reasonable indication of lack of market power" (*id.* at A45-A46 & n.65).

Finally, the Commission considered when a broadcast television signal would be presumed to be available off the air for purposes of its three-signal "effective competition" standard. It concluded that a signal would be deemed available when it placed a predicted "Grade B contour"—a measurement of the approximate extent of coverage of a television signal indicating that 50% of the locations at the edge of the contour can expect to receive a good quality picture 90% of the time (*Clarksburg Publishing Co.* v. *FCC*, 225 F.2d 511, 515-516 n.12 (D.C. Cir. 1955); see Pet. App. A135 n.8)—over any portion of the cable community or was "significantly viewed" (see 47 C.F.R. 76.5(k); Pet. App. A136 n.9) in the cable community. Pet. App. A50. The Commission noted that, under that standard, some cable systems will be determined to face effective competition "when in fact reception of three or more signals may not always be possible in the franchise area," but concluded that "administrative convenience" warranted the use of the signal availability standard it selected. *Id.* at A49-A50.

3. The court of appeals upheld the Commission's three-signal rule but invalidated its signal availability standard. Pet. App. A115-A185. The court noted that Congress has granted the Commission broad discretion in defining effective competition and had offered "no guidance on what factors the Commission should consider, or what weight it should assign to those factors." *Id.* at A143. With respect to its decision to define effective competition as the presence of three broadcast signals, the court concluded that "the Commission carefully considered proposed alternatives, explained the reasons underlying its decision, and reached a rational conclusion." *Ibid.* Therefore, "applying familiar principles

of judicial review" (*id.* at A142 (footnote omitted)), the court held "that the FCC's rate regulation rules are affirmed in all respects except to the extent specifically delineated" (*id.* at A143).

The court concluded that the Commission's determination of when a broadcast signal would be deemed available was faulty because of the "enormous margin of error created by its decision to 'count' *every* signal that covers '*any* portion of the cable community.' " *Id.* at A161 (citation omitted; emphasis in original). The court could not determine "why the 'any portion' standard was selected over a more refined geographical qualification, such as 'a significant portion of the cable community,' " or " 'over 75 percent of the cable community.' " *Id.* at A162 (citation omitted). On remand, the Commission has proposed to require that each of the three signals available in a community place a Grade B contour over at least 75% of the cable community. 2 F.C.C. Rec. 5888 (Sept. 28, 1987).

ARGUMENT

The court of appeals correctly concluded that the Commission did not err in promulgating its three-signal rule for determining when effective competition exists, and its decision does not conflict with any decision of this Court or another court of appeals. In addition, two other factors make review inappropriate here. First, most of the petitioners are participating in the remand proceeding concerning the standards to be applied in determining whether a signal is available in a community and the outcome of that proceeding could affect the practical importance of the question presented. Therefore, review is unwarranted at this time, especially since petitioners will be free to raise the issues presented in this petition, together with any claims arising out of the remand proceeding, after the

completion of that proceeding. Second, pursuant to Congress's directive, the Commission is monitoring the effect of its three-signal rule particularly closely so that amendments can be made, if needed, and in order to report to Congress by 1990 on the effects of rate regulation of cable services. In these circumstances, review by this Court at this time is unwarranted.

1. Petitioners primarily argue (Pet. 15-18) that, in determining that "effective competition" exists when three broadcast television signals are available in a community, the Commission departed from the unambiguously expressed intent of Congress. There is no merit to that argument.

As an initial matter, as the court of appeals concluded (Pet. App. A143), rather than defining "effective competition" itself, Congress granted the Commission "broad discretion" to define it and provided "no guidance on what factors the Commission should consider, or what weight it should assign to those factors." Section 623(b)(2)(A) simply directs the Commission to "define the circumstances in which a cable system is not subject to effective competition" (47 U.S.C. (Supp. III) 543(b)(2)(A)), to "periodically review such regulations" and amend them "to the extent the Commission determines necessary" (47 U.S.C. (Supp. III) 543(b)(3)), and to "submit to the Congress a report regarding rate regulation of cable services" by 1990 (47 U.S.C. (Supp. III) 543(h)). Thus, the only intent that is unambiguously expressed in the statutory language is Congress's intent that the Commission should have considerable discretion in determining when effective competition exists. The legislative history confirms that conclusion. The House Report—which was "specifically adopted by both the House and the Senate as their explanations of the Act" (Pet. App. A153 n.33)—states that "[t]he Committee wishes to stress that it intends to give

the Commission flexibility in promulgating these regulations." H.R. Rep. 98-934, 98th Cong., 2d Sess. 66 (1984).

In these circumstances, there is no basis for petitioners' argument (Pet. 16) that the Commission departed from Congress's clear instruction that it define effective competition with respect to a "cable system" rather than "basic cable service." Congress gave no such instruction. Hence, as the Commission concluded (Pet. App. A43-A45), it plainly had discretion not to consider the effect of premium service when Congress has barred rate regulation of such service.

Nor does petitioners' citation of the House Report (Pet. 17) support its conclusion that Congress directed the Commission to promulgate an effective competition rule based on factors in addition to the number of broadcast television signals available over the air in a community, such as the penetration rate. The House Report stated that the Commission "may find it relevant to consider factors in addition to the number of over-the-air broadcast stations in a market, such as the penetration rate." H.R. Rep. 98-934, *supra,* at 66. Accordingly, it was plainly within the scope of the discretion granted to the Commission to use factors such as the penetration rate or not to do so.

Finally, with respect to the merits of the three-signal rule, petitioners contend (Pet. 17) that the fact that Congress did not enact the Senate bill providing that effective competition exists when four broadcast television signals can be received over the air in a community shows that it did not intend the Commission to adopt its three-signal rule. That is a non sequitur. Congress decided that, rather than initially attempting to define effective competition itself, it would direct the Commission to do so (and to report to Congress on the subject by 1990). The fact that, after studying the issue, the Commission has decided, at

least initially, on a standard that is similar to what the Senate proposed is not evidence that it has erred.[1]

2. Petitioners' procedural arguments (Pet. 18-20) are also without merit and, in any event, involve nothing more than the application of settled legal principles to the facts of this case and accordingly do not warrant this Court's attention. First, petitioners contend (*id.* at 18-19) that the Commission did not set forth a principled antitrust market analysis in promulgating its effective competition standard and should have explained why it did not do so. That appears to be little more than another way of saying that petitioners do not agree with the Commission's conclusions. In any event, the Commission did fully consider the likely effects on competition of its three-signal rule (see

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[1] Petitioners note (see Pet. 10) that the Commission's three-signal rule differs from that proposed by the Antitrust Division of the Department of Justice. The Antitrust Division did not disagree with the Commission's conclusions that "effective competition" should be defined with respect to basic cable service rather than basic and premium service and that a penetration rate of 70% or more did not necessarily show that there was no effective competition in a community. However, the Division proposed a definition providing that effective competition exists when two of the following conditions are met: (1) five unduplicated broadcast signals, including all three major networks, are available in the community; (2) the total number of channels provided as part of basic service (excluding certain channels that have limited viewership) is less than three times the number of signals available over the air; and (3) no more than 20% of the cable system's subscribers subscribed to basic service only (*i.e.*, did not receive any premium service) on the date the Act was enacted. C.A. App. 156-161. The fact that the Commission did not incorporate requirements like those suggested by the Division in its effective competition rule (at least, not yet) does not show that it abused its broad discretion under the Act. And, of course, Congress remains free to consider whether it wishes to prescribe other standards by statute.

Pet. App. A42-A47). Petitioners may also be suggesting that the Commission should have bolstered its conclusions with quantitative analysis. However, as the court of appeals concluded (*id.* at A144 (footnote omitted)), the Commission conceded "[w]ith admirable candor * * * that its decision to define 'effective competition' in terms of the availability of three broadcast signals was not an exercise in 'scientific precision.' Rather, the Commission made a predictive judgment based on the evidence it had accumulated in the relatively short time frame within which Congress directed the agency to complete its rulemaking." And, while the Commission's rule cannot be shown by statistical analysis of evidence in the record necessarily to be the best possible rule, petitioners have presented no empirical data proving that a different rule better determines when effective competition exists.

Finally, petitioners err in contending (Pet. 20) that the Commission erroneously relied upon three studies—the "NCTA/CATA study," a study by Commission staff, and the "Kwoka study"—without addressing significant criticisms of the methodology employed in those studies. The Commission did not rely on the NCTA/CATA study, but merely noted (Pet. App. A43) that it had been cited by many commenters as providing support for a standard based on fewer than two signals, a standard the Commission rejected. Similarly, the Kwoka study (Kwoka, *The Effect of Market Share Distribution on Industry Performance*, 61 Rev. Econ. & Statistics 101 (1979)) supported a two-signal rule; while the Commission noted that it provided "[f]urther support" for its conclusion that a three-signal rule would not result in monopolistic practices by cable operators (Pet. App. A46), the Commission plainly did not base its decision on that study. Rather, as the court of appeals noted (*id.* at A144), the Commission's decision

was a predictive judgment based on conflicting information that it had accumulated in order to promulgate a rule in the time allotted by Congress. The Commission's internal study was similarly cited as "further evidence" supporting the Commission's decision (*id.* at A45) rather than as primary evidence. And, contrary to petitioners' complaint that it was "virtually unavailable" (Pet. 11, 20), the bulk of the study was provided to petitioners and placed in the public rule-making record within two weeks of the Commission's decision (see C.A. App. 541-553). In any event, the question whether in this basically interim proceeding—whose conclusions are subject to further consideration by the Commission and by Congress itself, in light of experience—the Commission impermissibly relied on the three studies petitioners cite plainly does not warrant this Court's attention.[2]

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[2] While *City of New York* v. *FCC*, cert. granted, No. 87-339 (Nov. 30, 1987), also involves interpretation of the Cable Communications Policy Act of 1984, the question presented there is whether the Commission permissibly preempted the states from adopting regulations governing the technical quality of cable broadcasts that exceed federal guidelines. No question concerning "effective competition" is presented and the case involves a proceeding before the Commission entirely separate from the proceeding resulting in the Commission's three-signal rule. Accordingly, there is no reason to hold this case for *City of New York*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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